No. 83-272

In the Supreme Court of the United States

OCTOBER TERM, 1983

BASIC CONSTRUCTION COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the jury was correctly instructed that a corporation may be responsible for the acts of its agents performed within the scope of their authority and to benefit the corporation.

2. Whether petitioner was prejudiced by the exclusion of testimony impeaching a government witness.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 711 F. 2d 570.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Basic Construction Company, its former employee David M. Howell, and two other defendants, Henry S. Branscome, Inc. and Henry S. Branscome, were indicted in the Eastern District of Virginia for conspiring to rig bids on highway surface paving contracts in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. 1. The indictment charged that the defendants and others

allocated among themselves highway surface paving contracts let in the Peninsula area by the Commonwealth of Virginia in April 1978.[1]

On petitioner's motion, the trial of David Howell, the former manager of Basic's highway division, was severed from the trial of the remaining defendants. See Order of November 24, 1981, Docket Item 14 (C.A. App. 3). Howell was convicted by a jury on December 9, 1981. The remaining defendants were convicted by a jury on February 26, 1982[2].

2. At trial, petitioner admitted (Tr. 1046) that its employees, through a series of meetings and telephone conversations, had conspired with personnel of other construction companies to allocate four highway resurfacing contracts let by the Commonwealth of Virginia in the Peninsula area in April 1978. The Basic employees involved in the conspiracy were Steven Colosi, then manager of Basic's asphalt division (Tr. 416) and David Howell, who supervised both the highway construction and asphalt divisions of the company (Tr. 416-417). The president of Basic testified that for the time period in question, he entrusted the day-to-day operation of the asphalt division to Howell and Colosi, to whom he had delegated final bidding authority on all state asphalt work (Tr. 688-689; C.A. App. 230-232). Indeed, Basic's president testified that he signed the bid forms in blank and gave them to Howell and Colosi, who filled in the bids at the bidlettings (C.A. App. 234-235; Tr. 432).

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[1]The Peninsula area lies in and around Hampton, Newport News, and Williamsburg, and includes the counties of James City, York, Gloucester, Middlesex and Mathews (C.A. App. 19).

[2]Howell and Henry Branscome were each sentenced to one year's imprisonment, with all but 120 days suspended, and three years' probation. Henry Branscome was also fined $18,000. Henry S. Branscome, Inc. was fined $225,000 and Basic Construction was fined $450,000. C.A. App. 63-65. David Howell did not appeal his conviction.

3. The court of appeals affirmed petitioner's conviction in a per curiam opinion.[3] The court first rejected petitioner's argument that the jury should have been instructed to consider its alleged antitrust compliance policy in determining whether the government had proved the intent element of the offense (Pet. App. 2-5). The court found that the jury instructions given were consistent with the well established rule that a corporation may be held criminally liable for the acts of its employees if they were acting within the scope of their actual or apparent authority and for the benefit of the corporation, even if such acts violated company policy or express instructions (Pet. App. 4-5). This rule, the court of appeals held, was not changed by this Court's decision in *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978), which merely defined the intent element of a Sherman Act violation and did not address the issue of corporate liability for the acts of its agents (Pet. App. 4). Moreover, the court of appeals noted that the jury was instructed to consider petitioner's alleged antitrust compliance policy in determining whether the employees were acting to benefit the corporation (Pet. App. 5). Finally, the court held that the trial court had properly instructed that the corporation's intent is shown by the actions and statements of its officers, directors, and employees who are in positions of authority or have apparent authority to make policy for the corporation (*ibid.*).

The court of appeals also held that the trial court's failure to allow petitioner to offer opinion testimony regarding Colosi's credibility after he had testified for the government did not warrant reversal of the conviction. While the court concluded that the testimony should have been admitted in accordance with Fed. R. Evid. 608(a), it noted that petitioner had vigorously attacked Colosi's credibility during

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[3]The court also affirmed the convictions of Branscome, Inc. and Henry S. Branscome.

cross-examination, that Colosi's testimony was corroborated by two other government witnesses, and that at least one of Basic's proffered witnesses was a current employee of the company whose testimony on Colosi's credibility would accordingly have been weakened (Pet. App. 9). In these circumstances, the court of appeals concluded that any error was harmless.[4]

ARGUMENT

The decision of the court of appeals is correct, and does not conflict with prior decisions of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioner argues (Pet. 4-10) that the trial court's instructions on intent violate this Court's decision in *Gypsum* and the *Model Penal Code*, because the jury was precluded from considering its antitrust compliance program in determining the intent element of the Sherman Act violation.[5] This argument ignores the settled law governing corporate liability for the acts of its agents, the jury instructions in this case, and the evidence presented at trial.

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[4]Judge Widener believed that the exclusion of opinion testimony was not harmless error. He would have awarded a new trial on that ground. Pet. App. 10.

[5]On the issue of corporate liability for the acts of its agents, the trial court instructed the jury (C.A. App. 349):

> A corporation is legally bound by the acts or statements of its agents done or made within the scope of their employment, and within their apparent authority, acts done within the scope of employment and acts done on behalf of or to the benefit of a corporation, and directly related to the performance of the type duties the employee has general authority to perform.
>
> • • • • •
>
> When the act of an agent is within the scope of his employment or within the scope of his apparent authority, the corporation is held legally responsible for it. This is true even though the agent's

This Court, like every court of appeals that has considered the issue, has held that a corporation is criminally liable for the unlawful acts of its agents, provided that the conduct is within the scope of the agent's authority, actual or apparent, and was intended to benefit the corporation. This is true even though the unlawful conduct was not specifically authorized, or was even contrary to the agent's actual instructions. *United States* v. *A & P Trucking Company*, 358 U.S. 121, 125-126 (1958); *United States* v. *Koppers Co.*, 652 F. 2d 290, 298 (2d Cir.), cert. denied, 454 U.S. 1083 (1981); *United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000, 1004-1007 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973); *United States* v. *American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204-205 (3d Cir. 1970), cert. denied, 401 U.S. 948 (1971); *United States* v. *Cadillac Overall Supply Co.*, 568 F.2d 1078, 1090 (5th Cir.), cert. denied, 437 U.S. 903 (1978); *Continental Baking Co.* v. *United States*, 281 F.2d 137, 149-151 (6th Cir. 1960). See also *American Society of Mechanical Engineers, Inc.* v.

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acts may be unlawful, and contrary to the corporations [sic] actual instructions.

The court also gave the following instructions, essentially as requested by petitioner (C.A. App. 350 and 29):

> A corporation may be responsible for the action of its agents done or made within the scope of their authority, even though the conduct of the agents may be contrary to the corporation's actual instructions, or contrary to the corporation's stated position.
>
> However, the existence of such instructions and policies, if any be shown, may be considered by you in determining whether the agents, in fact, were acting to benefit the corporation.

Finally, the trial court instructed that "[a] corporation's intent is shown by the actions and statements of its officers, directors and those employees who are in positions of authority or have apparent authority to make policy for the corporation" (C.A. App. 351). This instruction also follows almost verbatim an instruction requested by petitioner (C.A. App. 31).

Hydrolevel Corp., 456 U.S. 556 (1982) (nonprofit corporation subject to treble damage liability under the antitrust laws for the antitrust violations of its agents committed with apparent authority).

Contrary to petitioner's contention (Pet. 7), an instruction in a Sherman Act case that a corporation is responsible for the acts of its agents does not convert a violation of that statute into "a strict liability offense." Such an instruction plainly does not relieve the government of proving the intent element of the offense. Indeed, the jury here was expressly instructed that the government was required to prove two types of intent beyond a reasonable doubt: the intent to agree "and the intent to affect [sic] the object of the conspiracy" (C.A. App. 351). The government proved this intent element by establishing that petitioner's employees, using the authority expressly delegated to them and acting to benefit the corporation, knowingly participated in a conspiracy to rig bids. No further proof of intent was required.[6]

This Court's decision in *United States* v. *United States Gypsum Co.*, *supra*, on which petitioner relies, merely defined the intent element of a Sherman Act offense; it did not address the question of whose intent may be imputed to the corporation.[7] Thus, *Gypsum* casts no doubt on the

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[6]See, *e.g.*, *United States* v. *Cargo Service Stations, Inc.*, 657 F.2d 676, 682-683 (5th Cir. 1981), cert. denied, 455 U.S. 1017 (1982); *United States* v. *Koppers Co.*, 652 F.2d 290, 293-296 (2d Cir.), cert. denied, 454 U.S. 1083 (1981); *United States* v. *Society of Independent Gasoline Marketers of America*, 624 F.2d 461, 464-465 (4th Cir. 1979), cert. denied, 449 U.S. 1078 (1981); *United States* v. *Continental Group, Inc.*, 603 F.2d 444, 461-466 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980); *United States* v. *Brighton Building & Maintenance Co.*, 598 F.2d 1101, 1105 (7th Cir.), cert. denied, 444 U.S. 840 (1979).

[7]In *Gypsum*, this Court invalidated a jury instruction that allowed the defendants to be convicted for price fixing if the jury found that the *effect* of defendants' actions resulted in fixed prices, even if their intent has been merely to comply with the Robinson-Patman Act, 15 U.S.C.

principle that a corporation may be held criminally liable for the conduct of its agents, within the scope of their authority, for the benefit of their corporation.[8]

Nor does the *Model Penal Code* (Proposed Official Draft 1962) (MPC) absolve petitioner of responsibility for the actions of its employees here. While the MPC 207(5) provides that evidence that a high corporate official used due diligence to prevent the commission of the offense is a defense in a criminal prosecution, that defense expressly does "not apply if it is plainly inconsistent with the legislative purpose in defining the particular offense." MPC 207(5). Price fixing is precisely the type of offense "for which the legislature has plainly intended to impose liability on corporations." *Developments in the Law -- Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 Harv. L. Rev. 1227, 1251-1252 (1979).

13(b), by checking competitors' prices before "meeting the competition." This Court held that, contrary to the trial court's instructions, intent is an element of a Sherman Act violation.

[8]Petitioner's suggestion (Pet. 8-9) that the jury instructions in this case are inconsistent with *United States* v. *Hilton Hotels Corp.*, *supra*, and *United States* v. *Koppers*, *supra*, is incorrect. In *Hilton Hotels*, the corporation was held criminally liable because a purchasing agent for one of its hotels had entered into a conspiracy to boycott certain suppliers even though he had twice been warned not to join the boycott. The agent himself admitted receiving these instructions, but testified that he had joined the boycott nevertheless because of his personal animosity toward one of its objects. As in this case, the district court in *Hilton Hotels* correctly instructed the jury that the corporation was responsible for the acts of its agents within the scope of their employment. 467 F.2d at 1004. In *United States* v. *Koppers*, the court of appeals simply did not comment on the limited reference made to Koppers' alleged antitrust compliance policy. Rather, it expressly approved an instruction stating that a corporation was criminally responsible for the acts of its agents "done on behalf of and to the benefit of the corporation and directly related to the performance of the duties the employee has authority to perform" (652 F.2d at 298).

In any event, the trial court did instruct the jury that it could consider petitioner's compliance policies, if any, in determining whether petitioner's employees had acted to benefit the corporation (see n. 5, *supra*). Indeed, petitioner argued at length that its purported antitrust compliance policy rendered bidrigging beyond the scope of Howell's and Colosi's employment (see Tr. 1047-1051, 1054-1056). The jury, by its guilty verdict, rejected this argument, and rightly so, for the evidence established that the alleged compliance policy postdated the violation at issue.[9]

2. Petitioner also argues (Pet. 10) that it was "deprived of its opportunity to introduce evidence relating to the truth and veracity of Steve Colosi," one of the government's witnesses against petitioner. In fact, however, petitioner strongly attacked Colosi's credibility on cross-examination by questioning him at length about alleged self-serving and dishonest actions while he was employed by petitioner (C.A. App. 178-182). Indeed, Colosi admitted that he had lied previously concerning his involvement with bidrigging (C.A. App. 169). Since much of the proffered testimony involved the same incidents that petitioner had explored during its cross-examination of Colosi (compare C.A. App.

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[9]While its bidrigging activities reached back to the early 1970's (C.A. App. 150-151), petitioner did not fire Howell for bidrigging until 1979, a year after the offense here, when the government had already begun its grand jury investigation of area highway contractors for bidrigging (C.A. App. 162). Colosi was not fired until 1980, although he had been caught bidrigging at least eighteen months before (C.A. App. 163-164; Tr. 716). Other employees were not told the reason for the firings (Tr. 733-734; Gover't Exh. 63). Prior to the bidrigging at issue in this case, the company's "unwritten policy" against bidrigging amounted to vague instructions "not to embarrass the company," or, in some cases, not to talk to competitors about price fixing (C.A. App. 169, 194-195, 252, 277, 319, 324, 326). Far more explicit warnings were found legally insufficient as a defense to criminal Sherman Act liability in *Hilton Hotels, supra*, the case on which petitioner relies (Pet. 8).

301-303 with C.A. App. 178-182), the district court had discretion to exclude the proffered testimony as cumulative. *United States* v. *Dominquez*, 604 F.2d 304, 310-311 (4th Cir. 1979), cert. denied, 444 U.S. 1014 (1980). But even assuming, as the court of appeals found, that the proffered testimony should have been admitted, petitioner has failed to prove that it was prejudiced by the exclusion.[10] As the court of appeals noted, the exclusion of the proffered testimony was harmless in light of the corroboration of Colosi's testimony by other government witnesses, the extensive attack on Colosi's credibility by petitioner during cross-examination, and the fact that "at least one of the witnesses" petitioner attempted to call was a current employee of the company whose testimony was suspect for that reason (Pet. App. 9).[11] The appellate court's finding that the exclusion of the proffered testimony was harmless is based on the particular facts of this case, and does not present an issue of sufficient importance to warrant review by this Court.

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[10]In *United States* v. *Davis*, 639 F.2d 239, 244 (5th Cir. 1981), on which petitioner relies (Pet. 12), the court of appeals disagreed with the trial court's assessment of the cumulative nature of the proffered testimony and noted that there had been only limited impeachment of the government's key witness. Here, by contrast, there had been a wide ranging assault on Colosi's credibility during cross-examination and there is other evidence in the record corroborating Colosi's testimony.

[11]Apparently *both* proffered witnesses were current employees of petitioner (Pet. 10-11; C.A. App. 299-300).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1983

DOJ-1983-10